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IN THE

# In the Supreme Court of the United States

No. 178, OCTOBER TERM, 1920.

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ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY.....*Appellants,*

vs.

J. F. HASTY AND SONS, MOUNT OLIVE STAVE COMPANY *et al.*.....*Appellees.*

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## BRIEF FOR APPELLEES.

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The statement of the case made by appellant may be added to in some particulars:

The jurisdiction of this court is based on its jurisdiction in Allen v. St. Louis, Iron Mountain and Southern Railway Company, 230 U. S. 553, explained in Arkadelphia Milling Company v. St. Louis Southwestern Railway Company, 249 U. S. 134.

Rough heading, so called, is nothing more or less than a square block of wood from which headings for barrels are manufactured (R. 22). It is embraced in either of the descriptions "bolts or staves" (R. 28). Until this case arose there had been no thought or suggestion that so-called rough heading was not sufficiently described in the rough material items in the tariffs. The same description of rough material appearing in Item No. 79, Tariff No. 3, to-wit: "Rough lumber, staves, flitches, bolts and logs" appeared in all the tariffs issued by the carriers and approved by the Railroad Commission and issued by the carriers before the formation of the Commission (R. 23).

The word heading was put in the tariff casually when there was occasion to *lessen* the per cents of rough material that should be manufactured and shipped out (R. 21). Such tariffs had been in force by the St. Louis, Iron Mountain and Southern Railway Company in Arkansas for thirty-two years prior to the taking of the testimony in this case (1914) (R. 27, 29). During all of this period so-called rough heading had been treated by carriers and shippers

as within the designation of rough materials shown in the rough material rate schedules, the designation for which was the same as that shown in the copy of the schedules in the record. This practical construction of the meaning of these schedules in the tariff was general and without exception, and the correctness of that construction was not questioned until by appellant in this litigation (R. 24, 27, 28, 29, 30, 31). In billing, the practice of shippers and carriers' agents was to use the designation "bolts, rough heading, heading, rough staves or staves" indiscriminately as describing the rough materials that moved in the stave business under the rough material rates (R. 30). The exception of appellant to the report of the master was general and did not specify what part of the claims of appellant was based on movement of the so-called "rough heading" (R. 11). Each of the claims contained overcharges on shipments of rough material other than rough heading, and in some of the judgments appealed there were no instances of shipments of rough heading (R. 18, 19).

## BRIEF OF ARGUMENT.

The contention of appellant is based on some of the claimed to be expert testimony of four witnesses: Calif, Davidson, Rhoads and Warner. The sole basis for the testimony of each is that as the words "rough heading" did not appear *eo nomine* in the designation of rough material in Item No. 79 of the tariff, rough heading was not covered by it. This opinion was formed from mere reading of the tariff, without knowledge of the stave business, disregarding the stave business and not knowing the meaning of the general terms used in Item No. 79 to describe the rough material entitled to rough material rates. Their testimony shows their opinions are without value as expert testimony and the facts they state show they are wrong. Witness Calef stated his understanding of "rough heading" is that it is a square block of wood, he did not know of what dimensions (R. 22), (impliedly) from which a head or heads for barrels, casks, etc., were to be made. In finding the definition of "flitch," he took the matter up with the hoop makers, then got the dictionary "and worked it out" (R. 22).

He does not say that he ever tried to "work out" the definition of "bolt;" nor did he appreciate that he aptly described "rough heading bolts" when he gave his impression of what rough heading was. He said rough material rates *should* apply to rough heading, and then inadvertently used the term "lumber" as including it (R. 24).

He had a tariff issued in 1907 before him while testifying and the designations of rough material appearing there were identical with those in Item 79 (R. 23). He admitted he knew of a number of cases where the rough material rates had been applied on rough heading, and he knew of no instance in the past where they had not been so applied (R. 23). This witness was asked by a stave manufacturer in 1909 whether the products of a contemplated mill—rough staves and probably rough heading—were entitled to rough material rates, and he said they were (R. 31).

Witness Davidson had been in the accounting department of appellant. He had not *heard* the *term* "rough material" until the year 1912. Witness Rhoads was in the accounting depart-

ment of appellant. He had checked all the rough material in shipments on appellant's railroad from the year 1908 to 1913 (the word "heading" did not appear in the schedule until 1911) (R. 23) to ascertain whether those making claims for overcharges during the injunction period had shipped out the requisite quantity of manufactured products to entitle them to application of the rough material rates. During this critical examination he found *no single instance* where the rough material rates had not been applied on shipments of rough heading (R. 26).

The experience of witness Warner was substantially acquired while he was agent for the Missouri and North Arkansas Railway Company at the town of Leslie, Arkansas (1909-1914). He had no shipments of heading from that station until the years 1910 or 1911 (R. 27).

None of these witnesses had any experience in the stave busines or its traffic; nor did any of them claim to know what would be included in the terms "rough lumber," "bolts" or "staves." Opposed to this testimony is the plain language of the tariff and the testimony

of three persons who had been in the stave manufacturing business for many years (Hasty, Wrape and Kennard) and one who had for twenty-five years prior to the year 1904 been a traffic agent for appellant, and since that year manager of a traffic bureau, and had assisted in compiling tariffs, particularly those applicable to traffic in the State of Arkansas.

Witness Hasty had been in the stave business in Arkansas as a manufacturer and shipper for twenty years. There had been rough material rates in force by appellant in Arkansas for the past thirty-two years with the same designations shown in Item 79. Rough heading had always been treated as rough material under the tariffs. The witness had and exhibited paid freight bills covering shipments of rough heading in the years 1904, 1905, 1906, 1907 and 1908; and on all of them the rough material rates were applied. The dictionary definition of "bolt' would describe rough heading, and so would the definition of "stave." He had never heard a suggestion that rough heading was not covered by the rough material rates until a few days before he testified in this case (R. 27, 28).

Witness Wrape had been connected with the operation of stave mills in Arkansas for twenty-nine years and knew the stave business. The shippers and railroad companies had always treated rough heading as rough material entitled to those rates. He had never heard a doubt of the correctness of this practice suggested until he was called to testify in this case (R. 30).

Witness Kennard had been in the stave business in Arkansas since 1907. He stated that as a rule heading bolts were billed heading (R. 31). The first suggestion he heard that rough heading was not entitled to rough material rates was a few days before he testified in the case. In 1909 witness Calef had informed him that rough heading was entitled to rough material rates (R. 31).

Witness Bragg was in the traffic department of appellant for twenty-five years preceding the year 1904, and was appellant's division freight agent at Little Rock. Since 1904 he had been traffic manager of the Merchants' Freight Bureau. Rough heading had always been considered by the railroads and shippers entitled to rough material rates; never heard the correct-

ness of this practice questioned until a few days before he testified in this case (R. 29).

The dictionary definitions of either "bolts" or "staves" would cover so-called rough heading (R. 28) and so would that of lumber (175 Fed. 32).

The evidence established without dispute that the railroad companies, including appellant, for twenty or thirty years before the taking of testimony in this case (1914) had in force in Arkansas tariffs designating the rough materials entitled to rough material rates with the same words as those shown in Item No. 79, and in all this period it had not been suggested that "rough heading" was not within the designation (R. 23, 26, 28, 29, 30, 31). This being true, this practical construction that the terms rough lumber, bolts or staves sufficiently described the so-called rough heading must have been agreed in by the agents of the several railroads who operated in Arkansas and by all the shippers of those commodities. The force of this practical construction of the pertinent words in the tariff as properly used by the railroads during all this period to accurately describe the

traffic that had been moving under them is not at all impaired by the creation of the Arkansas Railroad Commission in 1899 and their supervision of tariffs thereafter. On the contrary the tariffs came to the Commission with a construction agreed in and acted on by all interested parties for many years and this construction was doubtless agreed with by the Commission for the traffic continued to move at the same rates without question. The Commission did not initiate or compile the tariffs, but this is done by the railroad companies and they are filed by them with the Commission as the rates and classification of commodities to be approved, corrected or revised by the Commission. Preceding the part of section 6802 of Kirby's Digest of the statutes of Arkansas quoted in the brief for appellant is the following:

"Every person or corporation operating any railroad or express business in this State is hereby required to furnish said Commission, within fifteen days after notice to do so, with the rate sheet and tariff charges for transportation of every kind over such railroad. It shall

be the duty of said Commission to examine and revise said rate sheet and tariff charges for freight or express matter for each railroad in this State, and determine whether or not and in what manner, if any, such charges and rates are more than just and reasonable compensation for the services rendered, and whether or not and in what manner, if any, said charges and rates are in violation of any of the provisions of this act."

Thus Item 79 of Tariff No. 3 appeared with the practical construction accepted by all interested parties that the rough materials termed "rough lumber, bolts or staves" included the shipments billed "rough heading." The ordinary meaning of any one of those terms would include it (Dictionaries; R. 28).

It is suggested that when it was discovered that the word "heading" was not in the description of rough materials *eo nomine* it was added and this was done in 1911. The fact is, it was never suggested that rough heading was not accurately enough described until the imagination of appellant was stimulated to find all possible objections to refunding overcharges, and

the point was first raised a short time before the taking of testimony on these claims (R. 28, 29, 30, 31). The conferences of the interested parties that preceded the tariff of 1911 were only to discuss and deal with a change in the per cent of the rough material that should be manufactured and shipped out (R. 21) and the thirty per cent on rough heading that was in Item 79 was substantially reduced so that thirty-five per cent of sawed heading, twenty-one per cent of split heading, bolts and logs was required in lieu of thirty per cent of all kinds of rough heading bolts, as had been in Item 79. It is apparent that the appearance of the word "heading" as rough material in the 1911 schedule was quite casual and not with any idea of covering something that was not already covered (R. 22). It is suggested that in the early days of the stave industry there were comparatively few shipments of rough heading and no occasion to specially name that commodity. This argument is best replied to with the ironical remark of the trial judge when he heard it: "I suppose in those days they made barrels with sides and no ends."

It is suggested that the fact that the tariff contained the word "heading" in the item fixing "flat" rates on staves, heading and hoops, is controlling (Item 41, R. 16). Of course, this item applies to other shipments than those where the conditions for application of the rough material rates can be complied with (*i. e.*, shipments over the same line of the product manufactured from the rough material). This item would properly apply to finished staves, heading and hoops. The "flat" rate on rough heading and rough staves is shown in the lumber rates in the description "stave bolts" (Item 40, R. 12).

Item 79 of the tariff clearly includes rough heading in designations that are proper and adequate. An effort to indulge a contrary construction leads to contradictions and absurdities in the item itself. It specifically provides for the shipment out of manufactured heading made from heading bolts, *i. e.*, rough heading.

The designation of rough materials was necessarily in few and general terms, readily understood by those who had occasion to refer to the tariff. There was neither occasion or ex-

cuse to enumerate as rough material all those special and colloquial names that are applied in any industry in the details of the business. It is important to the seller and the purchaser whether or not the article is adapted to a particular use, but if the article is in a general class for the purpose of rate making, the use the article is intended for is of no importance to the carrier. How naturally a general but sufficient designation of the rough materials embraced in Item 79 is made, is shown by the description employed by this court in Arkadelphia Milling Company v. St. Louis Southwestern Railway Company, 249 U. S. 134, where the court had before it the movement of lumber, staves and heading under Item 79 and said:

"Upon the facts as stated, it is our opinion that the district court erred in treating the movement of *rough lumber* from the woods to the milling point as interstate commerce" (p. 151, our italics).

Tariffs should be construed according to the common acceptance of the terms used. (C., B. & Q. Ry. Co. v. Feintuch, 191 Fed. 482, 488). While the terms "lumber" and "staves" would

each include a sufficient designation of so-called rough heading, the framers of the tariff undoubtedly intended the word "bolts" to cover rough heading. A rough heading is a "square block of wood" (R. 22) sawed or split (R. 28) intended to be manufactured into heads for barrels, casks, hogsheads, etc. Its size will vary according to its intended use and other circumstances.

The dictionaries define "bolt" in wood working as "a mass of wood from which anything may be cut or formed." Item 79 was construed according to this common acceptation of the term. The occasion for more specific designation of commodities only occurred when there was occasion to provide different per cents for the out-shipment of the manufactured products. There are named handle bolts and hub bolts, and boat oar bolts are manifestly included, as are many different bolts from which various articles of furniture may be manufactured. "Heading" is specifically named as manufactured from bolts, which could only be "heading bolts" or "rough heading bolts." Rough timber is usually cut with the ends

square. In this rough form it is suitable for making staves for the sides of barrels with little wastage, which would not be true with a finished head for a barrel, which must be cut round when finished, with a corresponding wastage from the rough heading bolt. Finished staves must be forty per cent of rough stave bolts, but if the bolts were not roughly cut to approximate dimensions thirty per cent was all that was required. The wastage in cutting a square heading round made the thirty per cent appropriate whatever the condition of the rough heading bolt, whether sawed or split. The heading is not cut round or circled until this is done in the cooperage plants to fit the particular barrels or casks manufactured there (R. 30).

In the abbreviations always used in railroad billing "rough heading bolts" readily became rough heading (R. 30). Appellant says the shippers should have applied to the Commission to make the tariff clear on this point. There was no occasion to make clear that which was already clear, and the tariff was clear to all interested parties, including the many officers and agents of appellant who had occasion to apply the rates.

It is intimated in the opposing argument that this court in Texas and Pacific Railway Company v. American Tie and Timber Company, 234 U. S. 138, held that crossties were not within the rates designated as lumber rates. What the court held in that case was that as the Interstate Commerce Commission had jurisdiction to order a refund of overcharges in the past and prevent overcharges in the future, it was the proper forum to interpret the tariff.

The Interstate Commerce Commission in Switzer v. A. & M. Railway Company, 22 I. C. C. 475, had before it the same tariff and situation in this respect as was sought to be presented to this court in the cited case, and the lumber rate was applied (p. 475).

In the case of American Tie and Timber Company v. K. C. & S. Railway Company, 175 Fed. Rep. 28 (CCA. 5th Cir.), that court held lumber included crossties and defined it as "including any timber sawed and split for use." In Hedlock v. Shunway, 11 Wash. 690, the term "shingle bolts" was used as describing bolts of wood from which shingles were to be cut. Similar citations showing by analogy that rough

heading would be embraced in the designations "rough lumber, bolts, and staves" might be multiplied, but we deem them unnecessary.

It is suggested that the remedy of the appellee is ruled by the case of Texas and Pacific Railway Company v. The American Tie and Timber Company, 234 U. S. 138, Mitchell Coal and Coke Company v. Pennsylvania Railway Company, 230 U. S. 247, and Loomis v. Lehigh Valley Railroad Company, 240 U. S. 43.

Those cases all arose under situations of rate making and remedies provided by the Interstate Commerce Act (Gimbel Bros. v. Barrett, 215 Fed. Rep. 1004). The Interstate Commerce Commission has wide powers for awarding reparation for overcharges. The Arkansas Railroad Commission does not have such powers and could neither award reparations nor render judgments for overcharges. Its powers are defined in sections 6787 to 6826 of Kirby's Digest. No jurisdiction is given it to hear or decide controversies such as appellant makes here.

The matter was passed upon by the master and by the trial court in this case and each decided against the contention of appellant.

We respectfully submit that the judgment appealed from should be shortly affirmed, and with all respect, suggest to the court that this is a proper case in which there should be imposed upon appellant the ten per cent damages provided for by Rule 23, sections 2 and 3 (Rev. Stat. S. 1010, 1012).

If our estimate of the case is correct, this court should not be troubled by appeals with contentions of as little merit as this one; neither should litigants in the position of appellees be harrassed with the inconvenience, expense and delay involved in making defenses against them. The litigation which appellant has provoked before returning to these shippers the amounts justly due them has worked considerable hardship on the claimants. In 1913 this court decided that the injunction restraining the operation of the tariffs was wrongfully issued (Allen *et al.* v. St. Louis, Iron Mountain & Southern Railway Co., 230 U. S. 553). With a laudable desire to save delay and unnecessary expense, the lower court appointed a master to ascertain the amounts due the several shippers, and at the request of appellant enjoined suits

on the claims in any other court (St. Louis, Iron Mountain & Southern Railway Company v. McKnight, 244 U. S. 368).

Appellant denied that it should refund any of the overcharges; denied liability for them on many different grounds, which were before this court and decided adversely in J. F. Hasty & Son v. St. Louis Southwestern Railway Company, 249 U. S. 134. That decision was in 1919. On the return of the case to the district court the present contention (regularly preserved by an exception) was urged against the particular claims of appellees. Of the claims of appellees for which judgments were rendered, it was not even contended that all of them were for shipments of the so-called rough heading, and in some of the judgments there were no shipments of any rough heading (R. 18, 19). Nevertheless the judgments in these cases were appealed from with the others (R. 32).

In Whitney v. Cook, 99 U. S. 607, this court took occasion to definitely announce:

"Our experience teaches that the only way to discourage frivolous appeals and writs of error is by the use of our power to award dam-

ages, and we think this a proper case in which to say that hereafter more attention will be given to that subject, and the rule enforced both according to its letter and spirit. Parties should not be subjected to the delay of proceedings for review in this court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked."

Peyton v. Heinekin, 131 U. S. Appx. CI.

Gibbs v. Diekma, 131 U. S. Appx. CLXXXVI.

Respectfully submitted,

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*For Appellees.*